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No. 10-1056

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN DOE, FATHER OF MINOR DAUGHTER, H. S., JANE DOE, MOTHER OF MINOR DAUGHTER, H. S., AND H. S., A MINOR FEMALE,

Petitioners,

v.

SILSBEE INDEPENDENT SCHOOL DISTRICT, RICHARD BAIN, JR., GAYE LOKEY, SISSY McINNIS, DAVID SHEFFIELD, RAKHEEM BOLTON, and CHRISTIAN ROUNTREE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SILSBEE, TEXAS, INDEPENDENT SCHOOL DISTRICT, RICHARD BAIN, JR., SUPERINTENDENT OF SCHOOLS OF SILSBEE, TEXAS, INDEPENDENT SCHOOL DISTRICT, GAYE LOKEY, SILSBEE HIGH SCHOOL PRINCIPAL, SISSY MCINNIS, SILSBEE HIGH SCHOOL CHEERLEADER SPONSOR

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QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the Fifth Circuit, in affirming, per curiam, the U.S. District Court's dismissal of Petitioners' suit, pursuant to FRCP 12(b)(6) and 8(a)(2), decided an important federal question conforming to relevant decisions of this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), obviating a review on certiorari under SUP. CT. R. 10(c).

2. Whether the Fifth Circuit, in affirming, per curiam, the U.S. District Court's determination that Petitioner H. S., a cheerleader, had no constitutionally-protected First Amendment free speech right to selectively participate, or to choose not to participate, in cheers supporting only particular players on her school's team, decided an important federal question conforming to relevant decisions of this Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, (1969), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and in *United States v. O'Brien*, 391 U.S. 367 (1968).

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STATEMENT OF THE CASE

Petitioners, John and Jane Doe, parents, and their daughter, H. S., then a Silsbee High School Junior, filed suit under 42 U.S.C. § 1983 in the U.S. District Court for the Eastern District of Texas, Beaumont Division, against Respondents Silsbee, Texas, Independent School District; Richard Bain, Jr., its Superintendent; Gaye Lokey, Silsbee High School Principal; and Sissy McInnis, Silsbee High School cheerleader sponsor; as well as Hardin County, Texas, District Attorney David Sheffield, and two Silsbee High School students, Rakheem Bolton, then a Junior, and Christian Rountree, then a Senior.

The claim against Silsbee ISD, Bain, Lokey and McInnis (School District Respondents) involved an incident during a Silsbee High School playoff basketball game in nearby Huntsville, Texas. Petitioner H. S. was present representing Silsbee High School as a cheerleader. Rakheem Bolton was playing for the Silsbee team.

During the previous game cheerleader sponsor McInnis had admonished H. S. that the school's cheerleader constitution required her and other cheer squad members to cheer during games for all players who were part of the team. In that game H. S. had elected not to stand or cheer with other cheer squad members when Bolton was shooting free throws. Nonetheless, on at least three occasions during the Huntsville game, and despite sponsor McInnis' earlier admonition, H. S. remained seated and silent when her fellow cheer squad members all rose and led the Silsbee student body and other supporters in cheering for Bolton at the free throw line.

When H. S. chose not to stand and cheer for Bolton, Silsbee High School students and other supporters, including Bolton's family and friends, voiced their outrage at H. S.'s conduct. Petitioner John Doe, H. S.'s father, was present as well, and his responses to those students and Bolton family members who opposed H. S.'s demonstration of disrespect produced a major disruption in the stands, eventually involving the Huntsville police. H. S. was then suspended from the cheer squad for two games. No other disciplinary action was taken against her.

Following her brief suspension from the squad, H. S., at the request of her father, was reinstated to the squad by Respondent Superintendent Bain. She was also permitted to try out for the cheer squad for the succeeding year—her senior year. She was chosen, and participated. There were no further incidents of disruption at school-sponsored events involving H. S. and Bolton. H. S. graduated last year.

Petitioners' § 1983 suit against School District Respondents is based on their claim that H. S. has a constitutionally-protected free speech right to cheer—or not to cheer, as she elects—even though she and other squad members signed a contract to cheer for all players on their school's teams at particular school-sponsored activities. Her reason for refusing to do so was personal, non-verbal, and ambiguous in intent and meaning to spectators (though obviously meant as a gesture of disrespect for team member Bolton), and cannot be categorized as protected speech. Respondents aver that she had no First Amendment right to disrupt a sanctioned school activity that was important to her fellow students, merely to express disdain for a classmate.

The U.S. District Court, after allowing Petitioners the opportunity to replead, granted Respondents' motions to dismiss under FRCP 12(b)(6), finding that Petitioners had failed to satisfy even the minimal requirements of FRCP 8(a)(2), and awarded attorney fees and costs to all School District Respondents under 42 U.S.C. § 1988.

Per curiam, the Fifth Circuit affirmed the district court's dismissal and refused en banc to grant a petition for rehearing.

MISSTATEMENTS OF FACT

In accordance with SUP. CT. R. 15(2), Respondents address and object to the following misstatements of fact in the Petition, and to their consideration by the Court, on the grounds that they (a) are not a part of the record below; (b) are irrelevant and immaterial to the issues raised in the Petition; and (c) constitute scandalous matter, in violation of SUP. CT. R. 24.6:

1. "H. S.' mother retrieved her daughter and took her to a clinic where she underwent a 'rape kit' examination." Petition for Writ of Certiorari at 2, *Doe v. Silsbee Independent School District, et al*, No. 10-1056 (Feb. 22, 2011)

2. "H. S. was then entered into a post-sexual assault recovery program." *Id.*

3. "[H. S.]'s therapist in that program advised her to resume her normal academic and cheerleading activities." *Id.*

4. "Petitioner . . . who was . . . at all times material to this claim, a patient in post-sexual assault therapy . . ." *Id.* at 11.

In addition, Respondents object to the following misstatements of fact, and to their consideration by the Court, on the grounds that they (a) are irrelevant and immaterial to the issues raised in the Petition, and (b) refer to scandalous matter, in violation of SUP. CT. R. 24.6:

5. All references to "a sexual assault of H. S.", or to Defendant Bolton's "documented sexual aggression", or "murderous threats". *Id.* at 1, 2, 7, 8.

6. All references to Bolton's student discipline issues unrelated to H. S.'s claims. *Id.* at 5, lines 23-31.

7. "H. S. accused Bolton of having violated her physically, emotionally and spiritually in the supporting presence of his small gang of fellow athletes." *Id.* at 8.

8. ". . . the basketball team that included the player [Bolton] accused of raping [H. S.]." *Id.* at 11.

9. "Respondents compelled her [H. S.] to cheer publicly for the man [Bolton] she accused of raping her . . ." *Id.* at 12.

Further, Respondents aver that it is undisputed in the record below that prior to all events pertinent to this Petition Bolton had been no-billed by a Hardin County,

Texas, grand jury in respect of all charges brought against him by Petitioner H. S. and her parents.

ARGUMENT

I. THE FIFTH CIRCUIT'S AFFIRMATION OF THE U.S. DISTRICT COURT'S DISMISSAL PURSUANT TO FRCP 12(b)(6) AND 8(a)(2) IS CONSISTENT WITH THIS COURT'S DECISIONS IN *TWOMBLY* AND *IQBAL*.

The district court concluded, and the Fifth Circuit affirmed, that Petitioners, in their original and amended complaints, failed to satisfy the minimum "plausibility" standard for notice in pleadings required by FRCP 8(a)(2).

In reviewing de novo and affirming the district court's FRCP 12(b)(6) dismissal, the Fifth Circuit, per curiam and en banc, quoted this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) to the effect that plaintiff must plead sufficient facts "to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)". *Doe v. Silsbee Independent School District, et al*, No. 09-41075, 2010 U.S. App. Lexis 19368, *4 (5th Cir. Sept. 16, 2010) (unpublished).

In *Twombly*, in upholding a Rule 12(b)(6) dismissal, this Court set aside the well-established test for notice in pleadings, and introduced a new, more stringent, "plausibility" standard. Explaining the "plausibility" standard, *Twombly* noted that FRCP Rule 8(a)(2) requires that a sustainable pleading must state a claim for relief containing "... a short and plain statement of the claim

showing that the pleader is entitled to relief." *Twombly*, 550 U.S. at 555 (citing *Conley v. Gibson*, 355 U.S. 41, 47 [1957]). *Twombly* recognized the need, at the initial pleading stage, for allegations to plausibly suggest a justicible claim reflecting the threshold requirement of Rule 8(a)(2)—that the "plain statement possess enough heft to sho[w] that the pleader is entitled to relief." *Twombly*, 550 U.S. at 557.

Twombly found that Rule 8(a)(2) requires more than a basic notice allegation. This Court opined, "We do not require heightened fact pleadings as specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not brought their claim across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 570.

The Fifth Circuit, in *In re Katrina Canal Breaches Litigation*, 495 F.3d 191 (5th Cir. 2007) (quoting *Twombly*), held that to survive a Rule 12(b)(6) dismissal motion a plaintiff must plead ". . . enough facts to state a claim showing that the pleader is entitled to relief." *In re Katrina*, 495 F.3d at 205. As the district court here found in its dismissal order:

> "Plaintiffs believe their daughter was injured and treated unfairly by the various Defendants. Regardless of whether their belief is correct, they have not alleged any facts that support a finding that she was denied her rights under the Constitution. The Court allowed them to file an amended complaint in light of the seriousness of their belief but the amended complaint has similarly failed to set forth claims for which relief may be granted and it has retained

> all the failing of the original complaint by **continuously referring to irrelevant matters and including unedited conjecture in place of factual allegations**." Petition for Writ of Certiorari app., *supra*, at 23a. (Emphasis supplied).

Petitioners' original and amended complaints fail to satisfy even the once-controlling notice-in-pleadings test, much less the more stringent "plausibility" test set out in *Twombly*. It is insufficient merely to assert, as Petitioners have done, that they have been wronged in some unspecified way by the School District Respondents.

In allowing Petitioners to amend its complaint in the face of school district defendants' Rule 12(b)(6) motions, the district court had found:

> "Plaintiffs' complaint is utterly insufficient, and the Court is inclined to grant dismissal. However . . . he Court will give Plaintiffs' counsel one—and only one—chance to file an amended pleading that complies with the Federal Rules of Civil Procedure, this Court's Local Rules, and the pleading standards generally applicable to federal, civil cases as set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Counsel is admonished to clearly and concisely state factual allegations that support the elements of the asserted causes of action, and to refrain from including speculation, rumor, and irrelevant matters." (Emphasis supplied). Appendix at 2a.

Petitioners' amended pleading is virtually a restatement of the original complaint, although the length of the amended (43 pages) is almost twice that of the original (23 pages). As the district court noted, the amended pleading equates to "speculation, rumor, and irrelevant matters." Petition for Writ of Certiorari app., *supra*, at 12a.

Neither the original nor the first amended complaint alleges that the cheerleading suspension resulted in a loss to the student of academic standing or other school-related opportunities, or limited her participation in other extracurricular activities. The cheerleading suspension lasted for only two games.

In *Iqbal*, this Court extended the *Twombly* "plausibility" standard to cover all civil actions, and expatiated upon that decision:

> "Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation"). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing

> more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 129 S. Ct. at 1949-50.

Petitioners' pleadings, to borrow from *Iqbal*, are "threadbare recitals," irrelevant ramblings insufficient to "unlock the doors of discovery" for these plaintiffs, "armed [as they are] with nothing more than conclusions."

II. THE FIFTH CIRCUIT'S AFFIRMATION OF THE U.S. DISTRICT COURT'S DISMISSAL FINDING OF NO FIRST AMENDMENT ABRIDGMENT IS CONSISTENT WITH THIS COURT'S DECISIONS IN *TINKER*, *HAZELWOOD*, AND *O'BRIEN*.

In *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir., 2001), the appellate court affirmed the district court's holding that a student did not have a protected First Amendment right to violate the school district's mandatory dress code. Citing *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Fifth Circuit found: "School boards, not federal courts, have the authority to decide what constitutes appropriate behavior . . . in public schools." *Canady*, 240 F.3d at 441 (Emphasis supplied). (citing *Hazelwood*, 484 U.S. at 267)

Petitioners cite *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, (1969), in which this Court acknowledged a student's First Amendment right to political expression (arm band) if its exercise does not contribute to a disturbance in the educational environment. As the Fifth Circuit held in *Canady*, applying the *Tinker* analysis to restrictions on non-political, personal student speech activity is

inappropriate, when the speech—as here—is viewpoint-neutral. *Canady*, 240 F.3d at 443.

It is submitted that there is no protected viewpoint involved in electing to stand and cheer—or not to stand and not cheer—for one's school's basketball team members during certain times in a game, when the intention of the actor is to publicly express personal dislike for a particular team member. Such disruptive conduct constituted ambiguous, silent, personal expression that occurred in the context of a school-sponsored activity attended by many Silsbee students, their families, and other supporters. Since the cheerleader's behavior was violative of reasonable, appropriate school rules which she had agreed to abide by, Petitioner H. S. must accept the consequences—in this case, a two-game suspension from cheerleading—if she insists on defying those rules.

Although Petitioners allege that cheerleader H. S.'s conduct was "symbolic" speech intended to convey to others her disdain for her free throw-shooting classmate, the district court found that the likelihood that spectators would take that meaning from her conduct "seem[ed] low." Petition for Writ of Certiorari app., *supra*, at 18a. The silent message was not sufficiently "particularized" to convey any meaning other than her lack of regard for the student, which could run the gamut of possibilities "from petty to grave." *Id.* at 19a.

The district court in discussing Petitioners' claim cited and quoted from *United States v. O'Brien*, 391 U.S. 367, 376 (1968):

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled

> 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Petition for Writ of Certiorari app., *supra*, at 18a.

As noted, Petitioner H. S.'s conduct produced a significant disruption among her fellow students attending the game. Silsbee High School team supporters raised an outcry in protest of her disdainful behavior toward the team and one of its members. Her father, Petitioner John Doe, responded, and the Huntsville police became involved. It is submitted that H. S.'s educational environment-disrupting conduct illustrates the type of protected free speech exception this Court recognized in *Tinker*.

Such a cause of action, given the vagueness of the pleading references, does not present a plausible First Amendment claim under the decisions of this Court, as required by FRCP 8(a)(2).

The Petition also makes passing reference to H. S.'s protected property and liberty interests, without undertaking to connect those constitutional rights with Petitioners' circumstances. In response, the Fifth Circuit quoted *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Texas 2005):

> "[S]tudents do not possess a constitutionally protected interest in their participation in extracurricular activities." Petition for Writ of Certiorari app., *supra*, at 5a.

As to Petitioner's due process claim, this Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) determined that ". . . to have a property interest

in a benefit, a person clearly must have more than abstract need of or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents*, 408 U.S. at 576-577.

CONCLUSION

The Fifth Circuit in affirming per curiam the U.S. District Court's dismissal of Petitioners' suit, pursuant to FRCP 12(b)(6) and 8(a)(2), decided the case in conformity with relevant decisions of this Court in *Twombly* and *Iqbal*, *supra*.

Further, the Fifth Circuit in affirming the district court's dismissal on the ground that Petitioner H. S. had no constitutionally-protected free speech right to cheer—or not to cheer, as she chose—for particular team members in violation of the school's cheerleader constitution, decided the case in conformity with relevant decisions of this Court in *Tinker*, *Hazelwood*, and *O'Brien*, *supra*.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION, DATED JULY 15, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. 1:09-CV-374-TH
JURY

C. and C.S., for their minor daughter, H.S.,

Plaintiffs,

v.

SILSBEE INDEPENDENT
SCHOOL DISTRICT, et al,

Defendants.

ORDER ON 12(b)(6) MOTIONS

Before the Court are *Motion to Dismiss of Defendants Silsbee Independent School District and Richard Bain, Jr. For Failure to State a Claim Upon Which Relief Can Be Granted* [Clerk's Docket No. 8], filed June 11, 2009; *Defendant David Sheffield's Motion to Dismiss* [Clerk's Docket No. 14], filed June 23, 2009; and *Motion to Dismiss of Defendants, Gaye Lokey and Sissy Mcinnis For Failure to State a Claim Upon Which Relief Can Be Granted* [Clerk's Docket No. 16], filed June 23, 2009.

In response, Plaintiffs have filed *Plaintiffs' Opposed Motion to Extend Time to File Responses to SISD Defendants' Motions to Dismiss, Motion to Strike ETC., and Motion for Attorney's Fees and Costs* [Clerk's Docket No. 18], on June 29, 2009; *Plaintiffs' Amended Opposed Motion to Extend Time to File Responses to SISD Defendants' Motions to Dismiss, Motion to Strike ETC., and Motion for Attorney's Fees and Costs* [Clerk's Docket No. 19], also on June 29, 2009; and, *Plaintiffs' Opposed Motion for Leave to File Response to David Sheffield's Motion to Dismiss* [Clerk's Docket No. 28], on June 28, 2009. In these filings, Plaintiffs' counsel does not establish good cause to excuse his late filings, but the matter is moot, as explained below.

Plaintiffs' complaint is utterly insufficient, and the Court is inclined to grand dismissal. However, out of an abundance of caution, the Court will give Plaintiffs' counsel one–and only one–chance to file an amended pleading that complies with the Federal Rules of Civil Procedure, this Court's Local Rules, and the pleading standards generally applicable to federal, civil cases, as set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Counsel is admonished to clearly and concisely state factual allegations that support the elements of the asserted causes of action, and to refrain from including speculation, rumor, and irrelevant matters. More instruction than that is beyond the Court's writ.

The Court will also grant a stay of discovery and cancel the forthcoming management conference, pending determination of the sufficiency of Plaintiffs' pleadings.

IT IS THEREFORE ORDERED that Defendants' *Motion to Dismiss of Defendants Silsbee Independent School District and Richard Bain, Jr. For Failure to State a Claim Upon Which Relief Can Be Granted* [Clerk's Docket No. 8], filed June 11, 2009; *Defendant David Sheffield's Motion to Dismiss* [Clerk's Docket No. 14], filed June 23, 2009; and *Motion to Dismiss of Defendants, Gaye Lokey and Sissy Mcinnis For Failure to State a Claim Upon Which Relief Can Be Granted* [Clerk's Docket No. 16], filed June 23, 2009, are all **DENIED WITHOUT PREJUDICE TO REFILING.**

IT IS FURTHER ORDERED that Plaintiffs shall file a first amended complaint, as set out above, on or before ***July 24, 2009.*** Defendants shall file additional 12(b)(6) motions within ten days of Plaintiffs' filing of his amended complaint, if necessary.

IT IS FURTHER ORDERED that *Plaintiffs' Opposed Motion to Extend Time to File Responses to SISD Defendants' Motions to Dismiss, Motion to Strike ETC., and Motion for Attorney's Fees and Costs* [Clerk's Docket No. 18]; *Plaintiffs' Amended Opposed Motion to Extend Time to File Responses to SISD Defendants' Motions to Dismiss, Motion to Strike ETC., and Motion for Attorney's Fees and Costs* [Clerk's Docket No. 19]; and, *Plaintiffs' Opposed Motion for Leave to File Response to David Sheffield's Motion to Dismiss* [Clerk's Docket No. 28] are all **DENIED AS MOOT.**

IT IS FURTHER ORDERED that Defendants' *Joint Motion to Defer All Discovery of Defendants Silsbee ISD and Richard Bain, Jr.; Gaye Lokey and Sissy McInnis;*

David Sheffield; and Christian Rountree [Clerk's Docket No. 24] is **GRANTED**. Discovery in this case is stayed pending determination of the sufficiency of the Plaintiffs' complaint.

IT IS FURTHER ORDERED that the management conference set for July 31, 2009 at 10 a.m. is hereby **CANCELLED**, and will be re-set, if necessary, after a determination of the sufficiency of Plaintiffs' complaint.

SO ORDERED.

SIGNED this the 15 day of **July, 2009.**

/s/
Thad Heartfield
United States District Judge